

# **Nonconformities**



White Paper Discussion  
City of Rockville  
October 24, 2005

Tonight is another introductory presentation on a major policy issue of the zoning revision. Goal tonight is to present the considerations of nonconformities, so when the terms are used throughout the revision process, everyone will be on the same page.

Unlike other presentations thus far, no meeting scheduled to readdress nonconformities. Hope to discuss the subject continually as we go through the drafting stage of the revision, potentially come back to the topic before adoption to address what will nonconformities will be created, how revision will deal with them.

Nonconforming projects in the pipeline at the time of the adoption – will need to be addressed, but for purposes of this presentation I have left them out.

## What are Nonconformities?

- Use / Development Standard
- Created prior to effective zoning
- Not meet current regulations
- “Run with land”
- Lawful



City recognizes 2 types of nonconformities – use and development standards

- A nonconformity is a use or development standard that was lawfully created prior to the effective date of ZO or amendment.
- Not meeting current ordinance minimum requirements for district in which it is located.
- Without nonconforming rights, continuation would be illegal (b/c goes against regulations).
- But with allowance, is permitted to continue though out of synch with overall vision of zoning. Theory – owner should not be immediately penalized for action affecting his property.
- Never protect what not legally established originally.

Consider nonconformities as a puzzle – The overall zoning vision is the puzzle picture. Nonconformities are missing pieces. You can get the gist of the whole picture with a few pieces missing but nonconformities can still prohibit the whole picture from being completed.

# Development Standards

- Lots
  - Previous zoning allowances
  - Public acquisition
- Structures
- Features
  - Parking structures / lots
  - Landscaping
  - Etc.



Every community establishes their own jargon and “development standards” are one for the City. The term is actually “development” in the current code but the 2002 proposed amendments clarify this as “development standards.” The term means three things, which may be separated out in other jurisdictions – lots, structures, and features.

**Lots** - legal when they were subdivided but do not meet the current regulations for lot size - width, depth, or access.

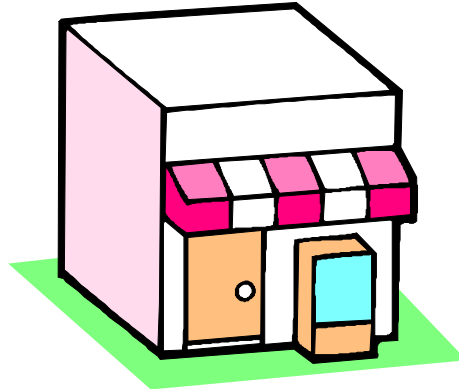
- Previous – number in the city 5,000 sq ft when current minimal size is 6,000
- Public acquisition - Other nonconforming lots have been created from public seizure of land for public purposes. When this occurs, structure renovations may no longer meet setback requirements. This policy, therefore, restricts maintenance and upkeep of property. A new section of the code may be required to address this concern and to allow continual maintenance, which the city wishes to encourage.

**Structures** – Legal at time of creation but bulk regulations been changed so now they encroach into setbacks or exceed height or area limitations

**Features** – physical requirement of lot development in the zoning code (such as parking, landscaping) that lawfully established prior to amendment but not meet new minimum requirements. Many required to conform to zoning standards within a set time.

## What are Nonconformities?

- Use
- Lot
- Building
- Parking
- Landscaping
- Signs



This picture – if we saw it in the full scope of the neighborhood – could be nonconforming for a number of reasons:

- Use - Stores in residential districts
- Lot - width or area not meet current requirements;
- Building – could encroach into setbacks, be too tall, cover too much of the lot
- No parking shown so likely not meet required off street parking spaces
- No trees/ buffer shown – so likely lack of / inadequate landscaping
- Awning may not meet requirements of size / signage / etc.

## General Regulations

- Established before adoption
- Existence alone  $\neq$  legal
- Non-enforcement  $\neq$  legal
- Burden is on the landowner
- Ownership changes permitted
- Minor repairs encouraged



First way to control nonconformities is to establish general regulations.

- The use or development standard must have been **legally** established **before** the effective date of the zoning regulation that prohibits it. In other words, if a use, structure, lot, or lot feature existed for a long time, that existence alone does not make it legal.
- A violation of nonconformity requirements, is still a violation and non-enforcement does not make a violation legal.
- A person who asserts that a nonconformity exists has the burden of proving that it exists, so that it may continue.
- Changes of ownership, tenancy, or management of an existing nonconformity are permitted but such nonconformities continue to be subject to the provisions of the code (unless specifically stated otherwise)
- Minor repairs and maintenance should be permitted and encouraged.

## Termination of Nonconformity

### ■ Termination of use prohibit reinstatement

- Abandoned
- Destroyed
- Superseded



Most nonconformities not an issue until something happens to them. The community is use to them, so they do not perceive them as a problem. When a change is proposed, there is the opportunity to require compliance *without excessive imposition on the property owner*. Raises a number of questions – 1) should we allow change; 2) if so, how much, and 3) if not all required to conform, where put change?

First change is termination - 3 Ways can be terminated

1. Abandoned – Nonconforming uses can be terminated if the owner fails to maintain a continual operation of the use. (set time frame in code to determine how long = abandonment)
2. Destroyed - If the structure in which the use is operated is destroyed, the use may be required to stop. The considerations with destruction are 1) the involvement of the owner in the destruction, 2) the amount of destruction of the structure. More leniency toward fire, flood, or other disaster outside will of the owner.
3. Superseded – If a use is replaced with another use that is permitted in the current zoning regulations, the nonconformity may not continue.

## Alteration of Nonconformity

- Level of Amendment

- Location
- Size
- Type

- Require

- Phase out
- Maintain status quo
- Limit modification
- Make conforming



Second opportunity to require compliance is when a use or structure is altered. Compliance with alteration depends on the imposition to the property owner and the imposition on the surrounding community.

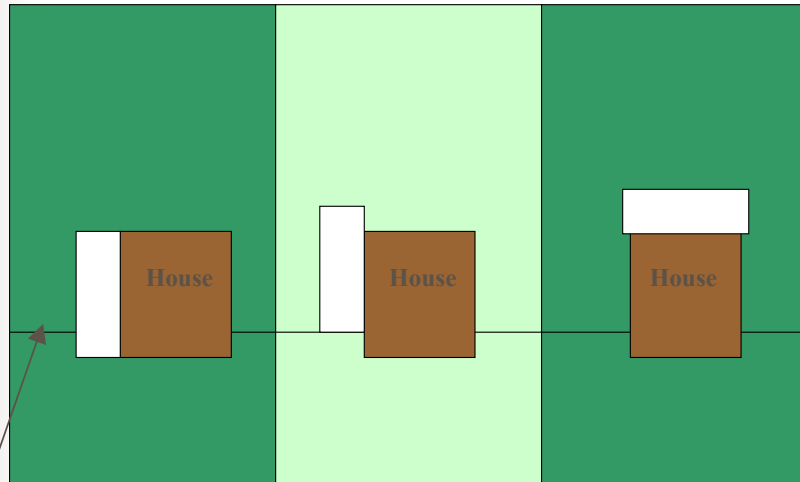
All nonconformities can have a greater impact in certain areas (residential) of the City than they might in other areas. The size of the change to the nonconformity can also determine the impact (deck v. 3 stories). Type of alteration (use might be more intrusive than small parking addition).

Once determine level of alteration allowed, then must determine to what degree the nonconformity must be changed – whole /part

1. Phase Out – require whole structure, lot, use to become conforming;
2. Not allowed to make any alteration – just keep what have;
3. Allow minor modifications under certain guidelines
4. Change the zoning again to make zoning regulations allow for structure, lot, or use. Whether to make an entire building or lot (use, structures, and lot features) conform to current zoning requirements if any addition is added; or whether to have only the addition conform.

A recent text amendment regarding impacts of industrial uses on residential neighborhoods - policy to allow nonconforming parking facilities to be maintained and repaired so long as nonconformity not increased. In addition, modifications allowed, even though such modifications not bring entire facility into full compliance; however, if any portion is brought into compliance, the nonconformity cannot be reestablished.

## Where Can Expansion Be Located?



Setback

Taken from: Markham, Lynn & Milligan, Diane, Land Use Education, Zoning Nonconformities: Application of new rules to existing development, Center for Land Use Education, January 2005.

Here house is nonconforming with regard to the setback line and all houses and additions are the same size. Assuming: 1) nonconformity regulations allow addition and 2) regulations do not require whole house to be made conforming – question is where to require addition to be located.



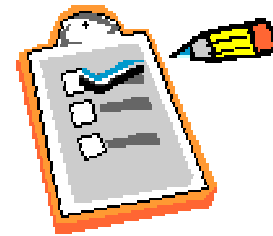
# Approval of Alteration

## ■ Current

- Bring into compliance
- Maintain safety
- Reviewed with use permit approval

## ■ Permit Approval

- Amendment
- Use Discontinuation



Currently, reviewed with requests for other permits – allowed to be extended only if modification brings it into compliance or does not extend the nonconformity or where necessary to maintain the building in safe repair

An alternative, more formal process, to current approval standards is to require the issuance of nonconforming permits. Would review on request to modify, the affect approval of the permit will cause on surrounding neighbors and may require any conditions particular to the individual application. If any of these included in revision, the particular requirements in the drafting stages.

- Amendment Permit - Through this process, permits would be issued at the time of *any changes* to existing nonconformity that do not bring it into compliance with the current zoning code standards.
- Use Discontinuation Permit - permits be granted when a use is discontinued for a set amount of time; but the property owner would like to renew the principal activity under the continuing nonconformity.

# Amortization

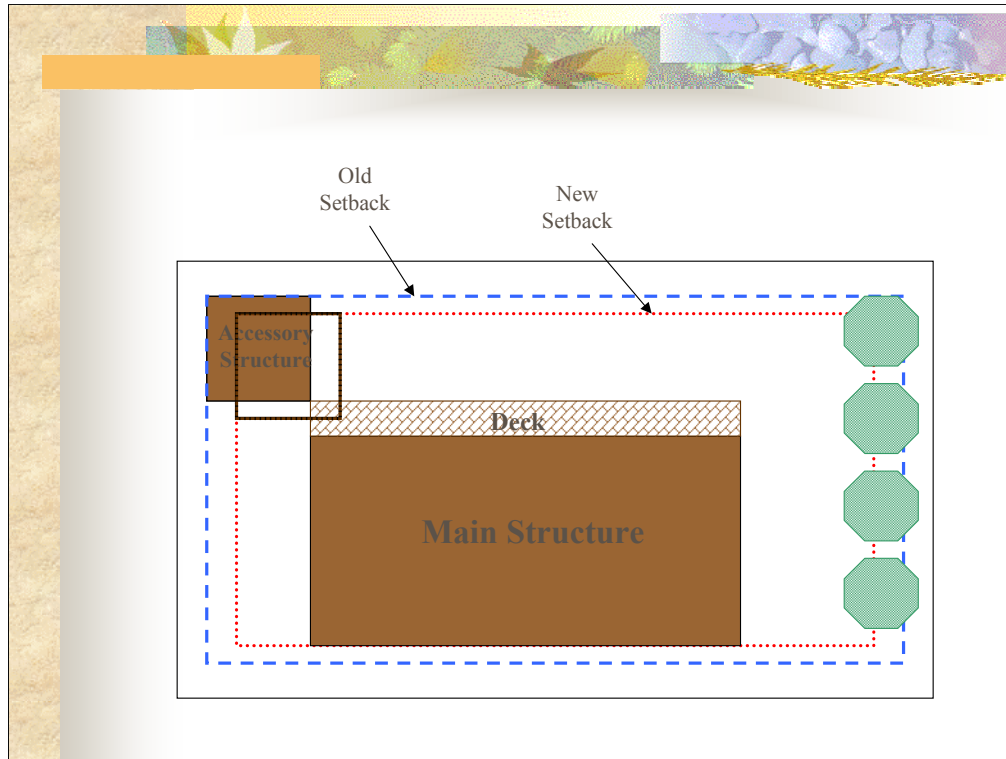
- Alternative to “immediate cessation”
- Establish date deadline
- Depend on:
  - Degree of nuisance
  - Size of investment
  - Ease of modification
  - Amount of time to recover costs



Third alternative to requiring compliance - Government may delay the effective date of regulations against pre-existing uses and development standards long enough to permit the owner to amend the deficiency.

Vary by the type of nonconformity desired to be eliminated (common are signs and sexually oriented businesses)

Adequate amount of time must be provided to ameliorate the problem



This picture is to give an example of the number of questions that nonconformities can raise. Assuming accessory and main structure, deck, and trees all there legally and existed before new setback adopted – raise following questions:

- Most agree would like to encourage maintenance and upkeep of the accessory structure but what if want to add on to it?
- Prohibit any addition and make whole building move into new setbacks?
- Allow new addition as long as it does not encroach into setbacks? Old or new?
- Allow go up but not out / out but not up?
- Allow minor changes / not major?
- Allow complete reconstruction if not fault of owner (natural disaster)?
- And what about the landscaping over on the side of that lot? If all the trees died, through no fault of the landowner, are they required to replant them?
- What if the main structure was allowed as a nonconforming catering business? But they want to add a few tables for sit-in restaurant, where do we draw the line to allow modification of the use?

## Conclusion

- Created when change zoning
- Must balance
  - Public interest in change
  - Private interest in maintaining
- Then decide
  - Phase out
  - Status Quo
  - Limit modification
  - Change Zoning



Nonconformities are created when zoning changes. Either small part or comprehensive change – all will affect what already there.

Called the Achilles Heel of zoning b/c they can be difficult to regulate

Must be in existence when the zoning changed, legal when created, and not allowed under current standards.

Key to any nonconformity regulation is to balance – 1) public interest in requiring the change so that everything conform to the vision of the zoning regulations and so not cause harm to community and 2) private interest (cost to change) to maintain it

From those policy decision can determine whether to phase it out / maintain status quo / limit modification / or to change the zoning to comply with the nonconformity

Currently, staff recommends using much of the 2002 nonconformities text amendment language. Upon the completion of other policy decisions, and much of the drafting stage of the ordinance, nonconformities will be reviewed again.